

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

**FILE:** B-218766 **DATE:** August 16, 1985  
**MATTER OF:** Presto Lock, Inc.

**DIGEST:**

1. Bid is responsive where the bid does not take exception to any of the IFB's requirements, including the requirement that the product offered be either a "commercial" or "commercial-type" product which meets the IFB's commercial item description.
2. To the extent that Commercial Item Certification clause set forth in invitation for bids may be constructed as constituting a definitive responsibility criterion, agency's determination that bidder is responsible is reasonable in view of information acquired during the bid evaluation period.
3. The fact that a proposed award may adversely impact on "union jobs" is not a proper factor for consideration in making the contract award.
4. Basis for protest--that proposed awardee has infringed on a similar patent held by the protester--is not appropriate for review by GAO.
5. Proposed award is not improper because bidder proposes to offer a foreign end product. While Buy American Act provides a preference for domestic items, it does not prohibit the procurement of foreign end products. Furthermore, the proposed award is not subject to the Buy American Act evaluation differential since the proposed awardee offered a designated country end product under the Trade Agreement Act of 1979 and the implementing procurement regulations.

Presto Lock, Inc. (Presto Lock), protests the proposed award of a requirements contract by the General Services Administration (GSA) to Howard Berger Co., Inc. (Berger),

under invitation for bids (IFB) No. AT/TC 19596. Basically, Presto Lock contends that the combination padlock offered by Berger in response to IFB line item No. 3 is unacceptable since it is not commercially available in the domestic marketplace and therefore does not meet the solicitation's requirement for a "commercial item."

The protest by Presto Lock is dismissed in part and denied in part.

The IFB was issued by GSA for the supply of indefinite quantities of various locks--office machine locks and padlocks. Awards will be made on the basis of the lowest price for each line item. The protested award is for item No. 3, a combination padlock in the estimated quantity of 24,804 per month for the period from the date of award through April 30, 1986. Berger submitted the low bid on item No. 3--\$2.65 for each lock. The second low bid was determined to be nonresponsive and, therefore, Presto Lock's bid (at \$2.92 for each lock) is next in line for award.

The IFB contains a "Commercial Item Certification" clause which provides that by signing its offer the offeror certifies that the product(s) offered meet the requirements of the commercial description set forth in the IFB and are the offeror's commercial or commercial-type product(s) defined thereat as:

"(b) A commercial product is a product such as an item, material, component, subsystem, or system (a) regularly used for other than Government purposes and (b) sold or traded to the general public in the course of normal business operations at prices based on established catalog or market prices . . . .

"(c) A commercial-type product is a commercial product (a) modified or altered, without degrading the quality, appearance, or function of the commercial products, in compliance with Government requirements and as such is usually sold only to the Government and not through the normal catalog or retail outlets, or (b) identified, packaged or marked differently than the commercial product normally sold to the general public."

The IFB did not require offerors to identify the make or model of their products or to specify the type and extent

offered. Similarly, nothing in the IFB required offerors to provide descriptive literature or any other evidence which would show that its product is a "commercial" or "commercial-type" product which would meet the solicitation's specifications.

Presto Lock asserts that Berger's bid is nonresponsive as to line item No. 3 because the padlocks offered are not "commercial" or "commercial-type" products and because they do not meet all of the specifications set forth in the IFB's commercial item description.

The bid submitted by Berger did not contain any reference to a product name or model nor did it cite any product modifications or provide samples or descriptive literature. Under the express terms of the IFB's Commercial Item Certification clause, Berger's signed bid constituted its certification that it was offering a "commercial product" or a "commercial-type product" which meets the requirements of the commercial item description. There is nothing in Berger's bid which would indicate that it qualified its bid in any manner or that it took exception to any of the IFB's requirements, including the Commercial Item Certification, as to the combination padlocks it would provide for item No. 3. A bid is responsive if it unequivocally offers the exact thing called for in the IFB so that upon acceptance it will bind the contractor to deliver an item in accordance with all the material terms and conditions of the IFB. Edw. Kocharian & Co., Inc., 58 Comp. Gen. 214 (1979), 79-1 C.P.D. ¶ 20; Schreck Industries Inc.; Raymond Corp., B-204050; B-204094, July 6, 1982, 82-2 C.P.D. ¶ 14. Since Berger offered to furnish either a commercial or commercial-type product which meets the requirement of the commercial item description and since it did not qualify its bid in any manner, we see no basis to regard Berger's bid as nonresponsive. See Harnischfeger Corp., B-211313, July 8, 1983, 83-2 C.P.D. ¶ 68. Furthermore, whether Berger will, in fact, deliver combination padlocks which are in conformance with the contract's requirements concerns a matter of contract administration which is the responsibility of the contracting agency and is not for consideration under our bid protest function. See Caelter Industries, Inc., B-203418, Mar. 22, 1982, 82-1 C.P.D. ¶ 265.

Since the IFB did not require that bids specify the make or model number or provide technical information concerning the locks to be provided, the Commercial Item Certification may be viewed as also relating to the

determination of bidder responsibility, that is, whether the bidder could in fact provide the required commercial padlock. See Harnischfeger Corp., B-211313, supra, 83-2 C.P.D. ¶ 68 at 3-4. Our Office does not review an affirmative determination of responsibility unless there is a showing of fraud or bad faith on the part of agency procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. Harnischfeger Corp., B-211313, supra, 83-2 C.P.D. ¶ 68 at 4 and 4 C.F.R. § 21.3(f)(5). Presto Lock has not alleged any fraud or bad faith on the part of contracting officials. However, the Commercial Item Certification may be construed as a definitive criterion of responsibility. See Data Test Corp., 54 Comp. Gen. 499, 502 (1974), 74-2 C.P.D. ¶ 365 at 4. Our scope of review in matters involving definitive responsibility criteria is limited to ascertaining whether evidence of compliance has been submitted from which the contracting officer reasonably could conclude that the definitive responsibility criteria had been met. Vulcan Engineering Co., B-214595, Oct. 12, 1984, 84-2 C.P.D. ¶ 403 at 7. GSA states that information provided by Berger during the bid evaluation together with a preaward survey, resulted in the contracting officer's determination that Berger is a responsible offeror capable of providing the combination padlocks as set forth in the IFB's commercial item description. The record shows that the combination padlock offered by Berger has been advertised for sale in Berger's commercial catalog since November 1983 and that the padlock is regularly used by other than government agencies. GSA has also provided our Office with a list of some prior commercial purchases of the combination padlock which will be provided by Berger. In these circumstances, we conclude that the contracting officer's determination that Berger is responsible was reasonable. This is particularly so in view of our position that the determination as to whether a product is a commercial item is largely within the sound discretion of the contracting officer. E.C. Campbell, Inc., B-203581.2, Mar. 19, 1982, 82-1 C.P.D. ¶ 256.

Presto Lock also protests award to Berger on the basis that such an award will result in a loss of "union jobs." However, we are not aware of any law or regulation which provides that the impact of a prospective award on the employment of union members is a factor in determining whether the award should be made.

Presto Lock also challenges the propriety of award to Berger on the basis that many imports have consistently show

a lack of quality and a disregard of United States patents. The protester advises that it has filed an action in Federal District Court for infringement of a patent involving a similar lock. Presto Lock's unsupported allegations against foreign products in general do not provide a proper basis upon which to protest award to Berger. This is especially so in view of our above findings that Berger's bid is responsive and that the contracting officer had a reasonable basis to determine Berger responsible. Furthermore, the fact that Presto Lock has filed an action for patent infringement against Berger concerning a similar lock does not provide a basis for our objection to award to Berger since the matter of patent infringements is not encompassed within our bid protest function. Sewer Rodding Equipment Co., B-214952, June 5, 1984, 84-1 C.P.D. ¶ 599.

Finally, Presto Lock objects to the proposed award to Berger on the basis that it is offering a foreign product and that such award will adversely impact on a United States company. The Buy American Act, 41 U.S.C. §§ 10a-10c (1982), provides a preference for domestic items in government procurement, but does not prohibit the purchase of foreign end products or require the disqualification of a bidder who offers a foreign end product. See Autoclave Engineer, Inc., B-217212, Dec. 14, 1984, 84-2 C.P.D. ¶ 668. Under the Trade Agreements Act of 1979, 19 U.S.C. §§ 2501-2582 (1982), and implementing regulations, the provisions of the Buy American Act do not apply to eligible products originating in designated countries when the total offered price is \$169,000 or more. See Federal Acquisition Regulation (FAR), 48 C.F.R. subpart 25.4 (1984). In its bid Berger certified that item No. 3, the combination padlock, would be of Hong Kong origin and that such padlocks qualify as "designated country end products."

Hong Kong is a "designated country" for purposes of the Trade Agreements Act of 1979, and as such that "country's" end products, which includes its products or manufactured items, are "eligible products" under the Trade Agreement Act and are not subject to the Buy American Act. See FAR, 48 C.F.R. §§ 25.401, 25.402.

Accordingly, award of the procurement for the padlocks to Berger will not violate any preference for United States products.

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The protest is dismissed in part and denied in part.

*for* *Raymond E. Van*  
Harry R. Van Cleve  
General Counsel